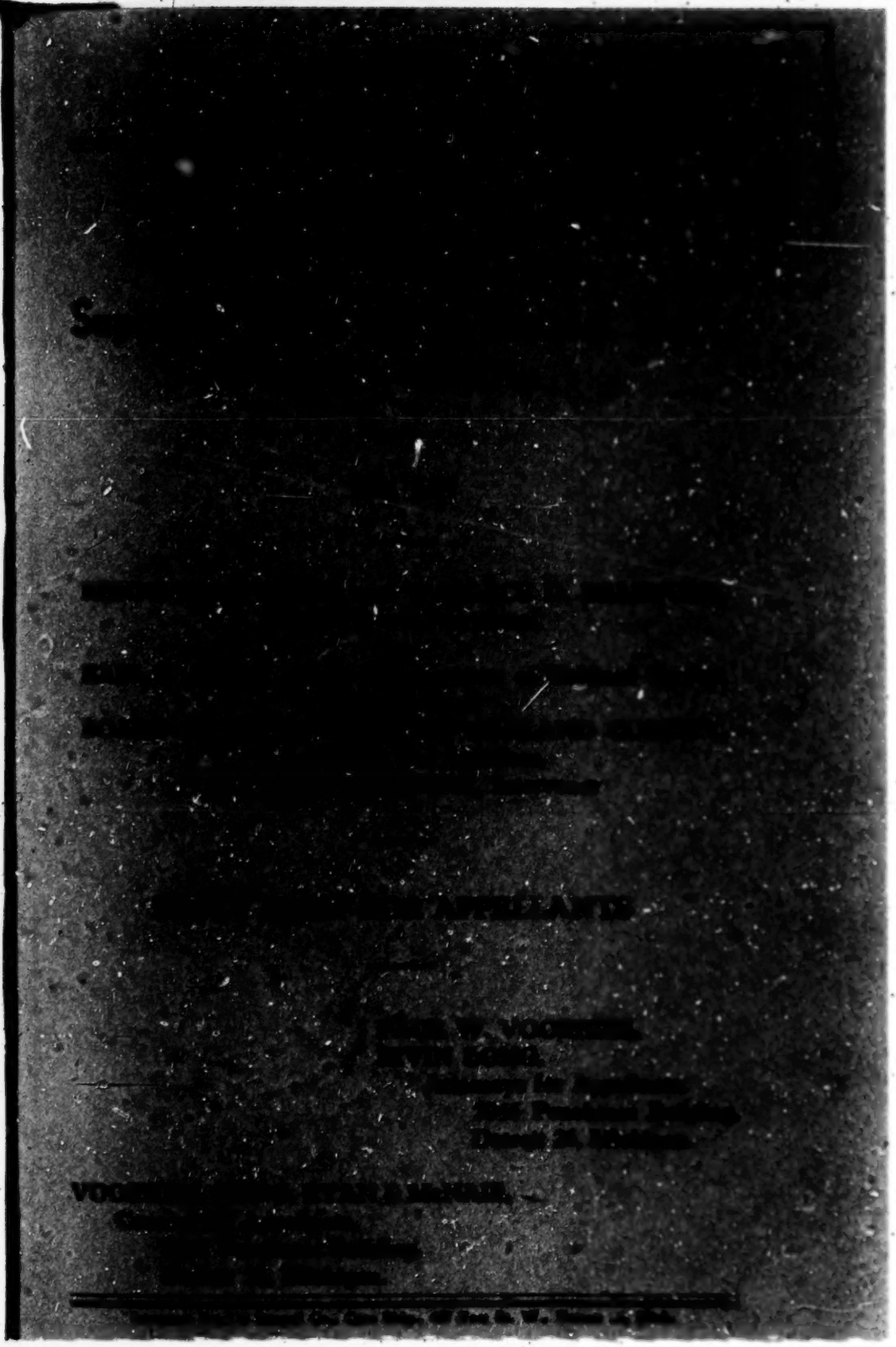

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United States of America

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 634

KENNETH M. KEEFE and WALLACE D. BRADFORD,
Petitioners and Appellants,
vs.
EARL L. CLARK, Drain Commissioner of Oakland County, Michigan, and
BOARD OF SUPERVISORS OF OAKLAND COUNTY,
Respondents and Appellees,
CITY OF ROYAL OAK, Intervenor

REPLY BRIEF FOR APPELLANTS

We shall in this brief cover some of the fundamental errors which seem manifest from a perusal of the briefs filed by appellees and the State Attorney General. The topics under which the argument will be divided are as follows:

1. Misconception of issues disclosed in opposing briefs.
   (a) Only right to a deficiency assessment involved.

(b) Portions of Acts 114 and 155 not affecting deficiency assessment will not be affected by reversal.

2. Answer to various arguments on question of jurisdiction.

3. Answer to various arguments for affirmance.

(a) No advance consent to withdrawal of taxing power given.

(b) Bonds are general obligations of district.

(c) Injury to bondholders in giving scavenger sale lands an exempt status.

(d) Police power not involved.

I.

MISCONCEPTION OF ISSUES DISCLOSED IN OPPOSING BRIEFS

(a) Only Right to Deficiency Assessment Involved

The opposing briefs barely mention the real point in issue, and devote most of their space to arguing the right of a state to pass legislation accelerating the date when title to delinquent tax lands vests in the state, and providing machinery for disposing of such lands after title is so acquired. No doubt that was as far as the legislature intended to go. No indication is given in the title to either Act 114 or 155 of an intent to create exemptions from any taxes to be levied in the future, and the peculiar interpretation given to the term "encumbrances" could hardly be anticipated. Had the statutes not contained the declaration that encumbrances are cancelled, and if the court had not interpreted the word "encumbrance" to apply to a deficiency assessment which might

in the future be required, there would be no controversy between these parties. The drain commissioner would have had no doubt of his duty and power to levy such an assessment against all the lands in the district not exempt by reason of the express exemption statutes. (See p. 30 of our first brief.) The refunding plan embodied in the commissioner's order (R. 11) would have been put into effect.

There was no petition by appellants for the levy of portions of the original assessment against scavenger sale lands. Neither the trial court nor the Supreme Court considered this question, and no error has been assigned here, (R. 51) because the lien of the original assessment was destroyed. Whether the legislature could constitutionally destroy such prior lien is a question on which no court has been asked to express an opinion.

Let it therefore be understood once for all that the question is the constitutionality of statutes, which have the effect of taking from bondholders the resource for the payment of their bonds, involved in the right to a deficiency assessment against all privately owned lands in the district.

(b) Portions of Acts 114 and 155 Not Affecting Deficiency Assessment Will Not Be Affected by Reversal.

The Attorney General's brief seems to be concerned with the fear that this court may declare Acts 114 and 155, with their amendments, void in toto. We ask no such decision, for if given it would go far beyond the necessities of the case. The provision inadvertently contained in these statutes, which has the effect of destroying the right to a deficiency assessment, is entirely separable, as is at once apparent by reading the word "en-

cumbrance" in its normal meaning of a burden upon land created or permitted by the owner, and excluding therefrom the meaning of such burdens as future taxation, which most persons would regard as a necessary concomitant of owning land in an organized community. Had the Supreme Court of the state placed that interpretation on the word, the statutes would have had all the beneficial effects intended so far as the state at large is concerned. They would have accelerated the date of acquisition of title by the state, and provided machinery for liquidating the titles so obtained.

It is difficult to understand how counsel for appellees can misunderstand the issue in this case when he so clearly stated in his brief in the Baker case the reason why bondholders were not injured by a liquidation of the lien of a special assessment at less than face value, inasmuch as the deficiency assessment would provide them with the means to obtain payment of their bonds. (See quotation, p. 15 of our first brief.)

II.

ANSWER TO VARIOUS ARGUMENTS ON QUESTION OF JURISDICTION

Appellees say, p. 30 of their brief, that appellants did not ask the trial court to pass upon the validity of Act 114. The record, however, shows (R. 3-5) that petitioners stated in their petition that they are entitled to a deficiency assessment as provided in the drain law, but that respondents claimed that they could not impose it because so many parcels had, in their opinion, become exempt. Petitioners further alleged that nothing contained in Act 155, Michigan Public Acts 1937, or any statute "*in pari materia*," could abrogate or curtail their right without violating Article I, Section 10, of the con-

stitution. Certainly no one could consider that Act 114 was not embraced in the term "*in pari materia.*" Appellees consistently argue that both statutes are part of the same legislative scheme.

The trial court said he was obliged to hold that the Municipal Investors Association case required him to decide that all privately owned lands which had passed through the scavenger sale were exempt (R. 31). This requires some consideration of that case. The opinion of Sharpe, C. J., signed by four other judges, thus constituting a majority since the court contains eight members, and two of the justices took no part in the decision, quotes from both Act 114 and Act 155 those portions which refer to the cancellation of encumbrances, and then proceeds to hold that the liability to a deficiency assessment is an encumbrance. The opinion then concludes, "it would naturally follow that the possibility of reassessment would constitute an encumbrance and thus be cancelled."

Appellants in the present case claimed error in their reasons and grounds for appeal (R. 1) because the trial court held that privately owned lands are exempt, thus challenging all the reasons given by the Circuit Judge for so holding. The Supreme Court noted appellees' argument that any subsequent legislation destroying the right to a deficiency assessment violated Article I, Section 10, saying that the "impairment argument was presented in both the Baker and Birmingham cases and denied in each decision" (R. 44). It quoted from Acts 114 and 155, and after referring to the interpretation of the word "encumbrance" it said that in connection with the impairment argument it was necessary to consider the causes leading to the legislation under attack. It thus recognized that the statutes forming the basis

for the Birmingham decision, and which it again quoted, were under attack.

It must be presumed that the Michigan Supreme Court read the petition in the record before it and saw that Act 155 and all acts *in pari materia* were alleged to constitute no bar to petitioners' claim, because of Article I, Section 10, of the Constitution. It took no narrow ground in deciding the case, such as would be involved, had it said to appellants, "You only mention Act 155 in your statement of questions in your brief, therefore we will say that Act 155 does not impair contract obligations and will not pass on the question in respect to Act 114." It treated all the legislation claimed to create the exemption as under attack, and proceeded to answer the attack.

Judicial Code 237a, which gives this court jurisdiction in appeals from the State Supreme Courts, does not specify that federal questions to be reviewed must have been presented to the state court in full compliance with the rules of that court. If the question is ignored by the lower court and the record fails to show proper presentation, this court properly refuses to pass on it, but a different rule governs an appeal where the lower court actually treated the question as before it, and decides it. There can then be no inquiry as to whether the lower court should have considered it, so long as it is material to the ultimate decision. The rule stated in *Bryant v. Zimmerman*, 278 U. S. 63, quoted on p. 10 of our brief opposing the motion to dismiss, is applicable. This necessarily must be so, for the question as to whether litigants conform to state procedural rules is a local question, which this court does not review. The lower court can waive its rules as to what questions it will pass upon, and if it does so, such waiver is not open to attack by an appellee.

Counsel for appellees, in their brief in support of the motion (p. 7), and the Attorney General rely upon *Honeyman v. Hanman*, 300 U. S. 14, and *Southwestern Bell Telephone Co. v. State of Oklahoma*. The correct citation of this is 303 U. S. 206. Appellees quote from the syllabus of the former case, which, of course, must be read in connection with the opinion. In that case the record and opinion did not disclose the raising or decision of a federal question, but a certificate was afterwards obtained to the effect that it was raised and decided. This court was not satisfied with the conclusions set forth in the certificate, and remanded the case for a further explanation. This apparently was given, for the case was again before this court in 302 U. S. 375, where the federal question was considered and the appeal dismissed for the want of a substantial federal question, the court indicating a long line of decisions where the precise question had been decided adverse to appellant. In the Southwestern Bell Telephone Company case the court said, "It must appear affirmatively from the record, not only that a federal question was presented for decision * * * but that its decision was necessary to the determination of the cause; that the federal question was actually decided or that the judgment as rendered could not have been given without deciding it." Cases cited in support of this, particularly *Whitney v. California*, 274 U. S. 357, show that whether the federal question appears to have been raised in pleadings, requested instructions, motions or assignments of error, it is enough if the opinion of the lower court shows the raising of the question, decision adverse to appellant, and materially to the ultimate conclusion reached. In that case this court noted that neither the record nor opinion showed that a federal question was presented or decided. But after writ of error had been issued by this court, and

had been returned, the state court entered an order to the effect that it had expressly considered and passed upon the question of whether the statute in question was repugnant to the 14th amendment. The court said:

> "So—while the unusual course taken to show that federal questions were raised and decided below is not to be commended—we will give effect to the order of the court of appeal, as would be done if the statement had been made in the opinion of that court when delivered."

This, in our opinion, conclusively shows that when the lower court expressly considers the federal question, inquiry is foreclosed as to how it came to consider it.

Other decisions as follows confirm us in the view that the broad statement in the Zimmerman case applies here, and is still the rule of this court:

Chicago R. I. etc. Ry. Co. v. Perry, 259 U. S. 548.

> "Defendant in error moves to dismiss the writ of error on the ground that the constitutionality of the act was not really at issue * * *. But since the court of last resort of the state actually dealt with and passed upon the question raised by plaintiff in error as to the validity of the statute upon the ground of its being repugnant to the constitution of the United States, and decided in favor of its validity, it is clear that under the first section of 237 Judicial Code, as amended by the Act of September 6, 1916, we have jurisdiction to pass upon the question."

Home Insurance Co. v. Dick, 281 U. S. 397.

> "That the federal questions were not raised in the trial court is immaterial. For the Court of Appeals and the Supreme Court of the State considered the questions as properly raised in the appellate

proceedings, and passed on them adversely to the federal claim."

Whitfield v. State of Ohio, 297 U. S. 431.

> "The record fails to show that the points made by petitioner in this court were properly raised in the trial court. But it sufficiently appears from the opinion of the appellate court that the court considered and passed upon the following questions * * *. These questions, therefore, are properly here for consideration."

Nickey v. State of Mississippi, 292 U. S. 393.

> "So far as the state court discussed these questions * * * with specific reference to the Constitution of the United States, both in its original opinion and in an opinion denying appellants' application for a rehearing, they may be reviewed here, notwithstanding the failure of appellants to mention them in their assignments of error to the State Supreme Court, as required by its rules."

Cumberland Coal Co. v. Board of Revision of Tax Assessments, 284 U. S. 23.

> "The specific contention that the plan of assessment violated the equal protection clause of the 14th amendment was presented by petition for reargument and was considered and was explicitly overruled by the Supreme Court. As the state court entertained and decided the federal question, this court has jurisdiction."

Arguments based upon the contents of appellants' briefs in the state court are irrelevant, for briefs are no part of the record. If briefs fully present the federal question, but the record does not, and the lower court ignores it, such presentation will not save the question for review in this court. *Zadig v. Baldwin,* 166 U. S. 485.

Conversely, it must be true that failure to properly present such question in the briefs cannot deprive appellants of the right to a review where the lower court fully considered it. The oral argument may have been adequate, and from it the lower court may have been brought to a consideration of the question.

On page 11 of appellees' brief on the motion, they admit that Act 114 is referred to in connection with the federal question in the reply brief of appellants in the state court, saying: "True, the reply briefs attempts to gather Act 114 of 1937 into the fold, but still the 'Statement of Questions Involved' presented to the Michigan Supreme Court did not pass on it other than to say, 'The impairment argument was presented in both the Baker and the Birmingham cases was denied in each decision.'" Probably something was omitted in printing this in appellees' brief, and what counsel intended to say was that the statement of questions did not mention Act 114, and that the Supreme Court did not pass upon it. We think the latter is unfounded for as we have pointed out above, there was in the opinion a complete reference to both Act 114 and Act 155, with quotations therefrom, before the court took up its reasons for holding the impairment argument inapplicable.

It is always unfair to pick out certain portions of a document, whether it is a pleading, opinion or brief, and to build an argument upon it. The portions of our reply brief in the state court where both acts are gathered into the fold, as appellees concede, are the following, which we quote:

> "To put our argument in its briefest form, we submit that the Commissioner is now obliged to levy a deficiency assessment upon the municipalities and every parcel of land in the district which is subject

> to ordinary taxes, and that he misconstrues the meaning of Acts 114 and 155 of 1937, as amended, in holding that any land subject to ordinary taxes has been made exempt from a deficiency assessment."
>
> • • • • •
>
> "But if the strange interpretation given to Acts 114 and 155 of 1937 is accepted, then surely we have statutes which in this instance violate the contract clauses of both state and federal constitutions. For if those statutes mean, as appellees insist, that taxing districts have had removed from them the bulk of their taxable property so that there can be no further imposition of taxes to provide funds for the retirement of their debts, then bondholders have had their contract rights impaired."

The Supreme Court of the state thus had before it ample printed argument, in addition to the oral argument, to justify it in considering that both acts, as parts of a general legislative scheme, were attacked by appellants as violative of the impairment clause, and could not be urged as a defense to appellants' claim that a full deficiency assessment should be levied.

III.

ANSWER TO VARIOUS ARGUMENTS FOR AFFIRMANCE

Apparently appellees agree with the general proposition that laws providing for the levy of taxes for payment of municipal bonds enter into and form a part of the bond contract, and except for inconsequential procedural changes, subsist until the contract is discharged, and that any change therein which takes from the bondholder resources for payment violate Article I, Section 10, of the Constitution; and further, that it is not a question of the degree of impairment. The least is as much

prohibited as the greatest. We agree that the portions of Section 5, 15 and 18 of the Drain Law quoted on pages 2, 3 and 4 of appellees' brief, constitute parts of the contract of the bondholders in this case.

(a) No Advance Consent to Withdrawal of Taxing Power Given.

Appellees say (p. 12 of their brief) that appellants had specifically contracted to have their lands (meaning, of course, land in the drain district) sold in compliance with the general tax law. If by this appellees mean that they agreed in advance to having general tax laws changed so as to provide the tax exemptions now decided to exist, the answer is "No." Section 5 provides that "drain taxes assessed under the provisions of this act shall be subject to the same interest and charges, and shall be collected in the same manner, as state and other general taxes are collected, and collecting officers are hereby vested with the same power and authority in the collection of such taxes as are or may be conferred by law for collecting general taxes." This looks to collection, and not to release of taxes. It merely provides that the drain taxes, when levied, shall go on the tax statements and be collected as the general state, county, township, etc., taxes are collected, and by the same officers, and under the same penalties and interest as apply to such taxes. It grants no consent to the passage of subsequent laws, withdrawing any part of the taxing power necessary to pay the bonds.

(b) Bonds Are General Obligations of District

Appellees contend that the bonds here involved are not general obligation bonds (their brief p. 35), which we

think is erroneous. They deny that the full faith and credit of the district is pledged (their brief p. 32).

While bonds shall specify on their face that they are payable out of installments of drain taxes to be thereafter collected, that is not the only resource for their payment, for if such taxes are not collected there must be an additional levy. The bonds are signed in behalf of the drainage district by the Commissioner. He is required to "pledge the credit of the drainage district, including the lands embraced within such district and the townships, cities, villages, counties and state trunk line highways assessed at large, in the proportion that they are taxed for the benefits received thereby." Counsel say, on p. 19 of their brief, that the district was never liable for more than 77½% of the indebtedness, ignoring the fact that the phrase "in the proportion that they are taxed for the benefits received thereby" applies to the lands and political units taxed at large. The district is the obligor on the bonds and does not tax itself. It promises to pay the bonds in full, not merely such amount as can be collected from the taxes levied. Otherwise the bonds would not be negotiable, for a bond without an unconditional promise to pay lacks the essential of negotiability. These bonds carry the direct and unconditional promise of the district to pay, even though the first resource to be looked to is the assessments (R. 7 and 8). In *Royal Oak Drain District v. Keefe,* 87 Fed. (2) 786, the court said in answer to a contention that Michigan drain bonds are not negotiable "that negotiability is not destroyed if all revenues of a district are pledged by a recited condition that funds must come from a single source. *Duval Cattle Co. v. Hemphill,* 41 F. (2) 433." These bonds differ materially from those involved in Municipal Investors Association case. The record in

that case (p. 9) shows that there the village only pledged payment from the special assessment fund when collected.

Drain bonds are not issued by a municipality to be paid merely from taxes which may be collected from a certain part of the territory within the municipality. The drain district is the municipality itself, and subject to suit in its own name upon the obligations. *Bloomfield Village Drain District v. Keefe,* 119 F. (2) 157. They are the type of obligation which this court referred to in its note to *Municipal Investors Assn. v. Birmingham,* 316 U. S. 153, at p. 159, as exemplified in *American Falls Reservoir Dist. v. Thrall,* 39 Idaho 105, *Noble v. Yancey,* 116 Oregon 356, etc. To this list we add *Hallenbeck v. Yuma County,*.....Ariz....., 145 Pac. (2) 837, decided February 11, 1944, wherein the court considered the question as to whether realty in a power district which had passed through a tax sale, and had been returned to private ownership, was subject to additional taxes. It held as follows:

> "Considering all of the provisions of the Power District Act, as well as the other pertinent statutes of Arizona, we hold: (1) that Power Districts were organized for public purposes and are quasi municipal corporations; (2) that they are given certain sovereign taxing powers, and that the intent of the legislature was to make their district indebtedness general obligations for the payment of which the whole district is obligated; (3) that the sale of real property in such a district for unpaid taxes discharges all tax liens and assessments theretofore levied against the property sold; (4) that the property involved in this litigation was not subject to district assessments after its sale to the State of Arizona, nor was it subject thereto after the issuance of the tax deed to the State and before the

sale to plaintiffs; (5) that when the property again passed back into private ownership by sale to plaintiffs it at once became subject to taxation for district purposes: The land remains within the district and is therefore subject to taxes subsequently lawfully levied and assessed for any district purpose, such as: Maintenance and operation, bonded indebtedness, and past delinquencies, whether of principal or interest. Since all lands of the district are entitled to equal benefits, it would be arbitrary and unjust to make any distinction between lands theretofore sold for taxes once they went back on to the tax roll, and of other lands in the district that had not passed through this tax sale process."

We fail to see how the Michigan Drain Law can be construed in any light other than that drain bonds are full general obligations of the district which issues them.

1. They are issued in behalf of the district by the commissioner, and he pledges therein the credit of the district. Act 316, Michigan Public Acts 1923; Chapter X, Section 18; Section 4937, Michigan Compiled Laws 1929.

2. With respect to all bonds issued after the effective date of Act 331, Michigan Public Acts 1927 (and this applies to these bonds), the county was required to advance moneys from the general fund for their payment, to be reimbursed from drain taxes subsequently collected, except in case such advancement caused the debt of the county to exceed its constitutional limit. Section 4937, Michigan Compiled Laws 1929.

3. "Whenever the amount assessed for the construction of any drain shall not be sufficient to complete the same, and to pay all costs and incidental expenses or to pay the principal and interest on bonds if such are issued, further assessment shall be made to meet the deficit or

additional expense. Such further assessment shall be apportioned, assessed, levied and collected as provided in the first (1st) instance and on the same percentage, and shall be collected in one (1) year, but there shall be no review nor appeal from such further assessment." Act 316, Michigan Public Acts 1923; Chapter IX, Section 3, Section 4917 Michigan Compiled Laws 1929.

4. Direction to the commissioner as to the levying of annual installments contained in Act 316, Michigan Public Acts 1923, Chapter X, Section 2, Section 4924 Michigan Compiled Laws 1929, are as follows:

> "The commissioner shall prepare a tax assessment roll in each year for the collection of taxes for the current year, and shall certify the same to the county clerk on or before the first (1st) day of the annual meeting of the board of supervisors. In each such roll he shall add to the amount to be collected, interest on all unpaid installments to the date of tax collection. To the roll for the last year he shall add such further amount, if any, as may be necessary, together with outstanding uncollected taxes, to pay all outstanding bonds and interest thereon to maturity."

5. After the bonds have all fallen due and there is insufficient in the fund to pay them, he shall make the deficiency assessment invoked in this case. Section 4940, Michigan Compiled Laws 1929.

6. Following certain criteria set forth in *Judith Basin Irrigation District v. Malott*, 73 F. (2) 142, for determining that improvement district bonds are general obligations, we add the following: (a) The amount of the bond does not represent a lien upon any particular piece of property. (b) The bonds on their face purport to be obligations of the district, and not of any specific piece of property or of any owner of any individual piece of

property. (c) The purchaser of a bond cannot enforce it against any particular piece of property, nor can the owner of any particular piece of property pay the bond and thus discharge his land from the lien. (d) The purchaser of the bond must rely upon the collection of such assessments as the law authorized to be levied, plus to a limited extent, the general fund of the county. (e) The payment of the bonds of earliest maturity does not release any parcel of land.

The Michigan courts have not directly passed upon whether such bonds as these are general obligations of the district, but its decision below in holding that municipalities and non-scavenger sale lands are subject to a tax for a part of the deficiency is consistent with that view. As this court said in the Municipal Investors case, "Assessment bonds may be based on undertakings whereby benefited lands may be liable even after they were sold to pay the assessment liens upon them to recover for defaults in sales of other assessed properties. See *Kadow v. Paul,* 274 U. S. 175." Subsequent to the Kadow case this court decided *Roberts v. Richland Irrigation Dist.,* 289 U. S. 71, wherein it said:

> "The principle applied in *Norwood v. Baker,* 172 U. S. 269, 19 S. Ct. 187, 43 L. Ed. 443, and similar cases, has no application here. Appellant's land will be assessed to meet a general obligation of the corporation and the mere fact that the apportioned burden will exceed estimated benefits gives no color to the claim of confiscation. As pointed out in the cases cited lands may be taxed to pay for local improvements although they receive no actual benefits. Never, as the Supreme Court of the state has said, was appellant entitled to the segregation of his share of the corporate obligation. The statute did not contemplate that assessments against any tract should be limited to payment of its increased

value. A general obligation was created and every tract subject thereto."

The confusion betrayed by appellees' brief results from supposing that a municipality which gets its revenue from taxes assessed on the benefit basis, rather than from unlimited *ad valorem taxes,* changing in rate and amount from year to year, must necessarily be held to have issued something other than a general obligation bond. This is untrue, for the character of the bond must be determined by the nature of the obligation expressed therein (as authorized by the law), rather than by the nature of the revenue from which it is to be paid.

Necessarily property in a municipality which has issued general obligation bonds becomes a virtual surety for other property. Extinguishment or destruction of other property as tax resources results in the load of municipal debt resting entirely upon what remains. Although rarely, it sometimes happens that this load threatens confiscation of the remaining property and the municipality is to all intents and purposes insolvent. The possible removal of a factory upon which the inhabitants depend for employment, and the loss to the community of the taxes which the factory property must pay, is always a hazard considered in purchasing general obligation bonds of a one industry town.

There is, therefore, ample ground for holding these bonds general obligations of the drain district, intended to be met at all times by the tax resources of the district. Appellees say (p. 31 of their brief) it is ridiculous to suppose that after the state held the lands for one hundred years, the fourth and fifth generations of bondholders might "pop up some day and greet the stranger in possession and say, 'you owe me some money on the

East Clawson Storm Sewer Drain.'" The question is extreme because bondholders would hardly spend the money for that length of time taking judgments upon the bonds to prevent the running of the statute of limitations, but it is conceivable that they might for twenty or thirty years so as to be ready to liquidate them when the community developed to a point where the land would be in demand. There are many instances where bonds of some communities have been kept alive, and liquidated as a result of the growth and return of prosperity of the municipality once considered hopelessly bankrupt.

(c) Injury to Bondholders in Giving Scavenger Sale Lands a Tax Exempt Status.

Again and again we find appellees asserting statements as follows: "Appellants have been deprived of nothing, hence their claim of impairment is without foundation," p. 2 of their brief. "If Acts 114 and 155 had never been passed appellants could and probably would have been in the same position they occupy today," p. 24 of their brief.

The loss to bondholders appears, according to their computation (p. 36 of their brief), to be more than 50% of the deficiency.

Certainly many conditions can happen which will cause loss to an investor in a municipal bond, even though there has been no interference by the legislature in changing tax resources. No one can know with certainty, however, when a change in law depriving bondholders of tax resource is made, what their exact position would be if there had been no such change, and we insist that it is not incumbent upon bondholders to prove the extent of their loss, nor is it the province of a court to indulge in conjecture.

When the question arose in this court as to the power of states to pass bankruptcy laws involving a release of a debtor from his obligations, there must have been an argument to the effect that creditors should not complain because they could not prove that the debtor whose property had been surrendered in the proceeding would again have property sufficient to pay the creditors, but the court, in *Sturges v. Crowninshield*, 4 Wheat 197, 198, said:

> "But it is not true that the parties have in view only the property in possession when the contract is formed, or that its obligation does not extend to future acquisitions. Industry, talents and integrity constitute a fund which is as confidently trusted as property itself. Future acquisitions are, therefore, liable for contracts, and to release them from this liability impairs their obligation."

In *Bank of Minden v. Clement*, 256 U. S. 126, the court reversed a state court which upheld a statute exempting proceeds of insurance from liability for debts created prior to the passage of the law. It was not impressed by the fact that the state court had said that the law "impaired the obligation of pre-existing contracts very slightly and remotely."

Because a creditor cannot say with certainty that the debtor will again rehabilitate himself and be in a position where he can be forced to pay is no justification for taking from the creditor the right to look to such future property as the debtor may be industrious enough, or lucky enough, to acquire. While municipal corporations do not have the prospect of acquiring future property, the possibility of changes in economic conditions whereby their tax resources can become valuable is the same type of potential resource for debt payment as the court mentioned in *Sturges v. Crowninshield* (supra).

Can the court say that bondholders are in no worse position because the statutes of 1937, as interpreted by the state court, take away this right to a deficiency assessment? We recognize that there are situations where some subsequent change of law in regard to tax collections or enforcement do not interfere with rights flowing from the bondholders' contract. A change in the officers who are obliged to levy or collect the assessments, a change in times of levy and collection dictated by administrative requirements, and not by a purpose to evade the debt, fall within this category. But this change is not of that character. There was a clear and definite right to the deficiency assessment, a right previously recognized by the court, of vital importnce in providing funds for the payment of a drain debt, for in *Regents v. Pray,* 264 Mich. 693, 700, the court considering a defense by a county to a claim that it should advance money to pay drain bonds from its general fund in accordance with the law then existing, said that the county would be reimbursed for such advancement by the levy of a deficiency assessment. Said the court:

> "Regardless of the temporary advancement by the County, in the end payment is by the drainage district. If the first assessments are inadequate, there is express statutory provision for an additional assessment upon the drainage district. 1 Comp. Laws 1929, Art. 4940."

A municipal corporation, or other public body empowered to incur a general obligation, cannot discharge the debt or any part of it by merely requiring the creditor to accept certain of its assets in fulfillment thereof, unless such is the contract with the creditor. This is well illustrated in *Pryor v. Goza,* 172 Miss. 46, 159 So. 99. The statute there under consideration provided for proceedings to value the assets of a drainage district, i.e.

the assessments which could be collected, and if determined to be less than the bonded indebtedness to issue liquidation certifies in amounts determined to be equal to the assets, which when discharged would free the lands from further taxes, except for maintenance and administration. The court held the statute invalid because of impairment of the obligations of contract, saying:

> "It is difficult to conceive of the insolvency of a taxing district; the lands constituting the district are there,—they cannot be lost except by title in the state. Furthermore, the assessed benefits of the district may be wholly insufficient to pay its obligations during the years of an economic depression, and amply sufficient for many years after recovery from such depression * * *.
>
> "Where a statute makes a contract more beneficial to a party and less to the other than its terms provide, its obligation is impaired; releasing only a part of the obligation impairs the contract. A law which enlarges, abridges, or in any substantial way changes the intention of the parties as expressed in the contract impairs the obligation. A law dispensing with any substantial force of the contract, imposing conditions not expressed, or dispensing with those expressed, is a violation of its obligation."

The court, in speaking of insolvency, was, of course, not considering it in the sense of present inability to meet debts, but in the sense of total inability, present and future. The municipality is not merely an aggregation of individuals to be looked to for contributions to pay the debt. It has a fixed body of property, which cannot be moved away, which can always be taxed so long as it is not in the hands of the federal government, the state, or any of its municipalities, and used for governmental purposes. Creditors have a right to

rely upon the power to tax this property, when it is provided in the contract that such taxes shall be levied. They take the chance, it is true, that temporarily the property may be in the hands of the state through the operation of tax enforcement proceedings, but the chance that it will be sold by the state and returned to taxable status is a resource of some value, which cannot be taken away from them by state legislation. It is possible that this year it may seem of little or no value, but next year it can be of great value, dependent upon circumstances which no one can predict.

No evidence can be found in this record which justifies anyone in saying that the small pittances which will be paid to these bondholders out of the proceeds of scavenger sales is all that they could hope to receive, if they have the right to a deficiency assessment as provided in the law. It is a mere conjecture to say that the man who bought a parcel of land at scavenger sale for 25% of assessed valuation did so with the expectation that the land would be exempt from any levy for future drain taxes to pay the district debt, and that if he had not expected such exemption he would not have bought it. The purchasers at the sale may be credited with having enough knowledge of law, or to have been so advised by competent counsel, that a future assessment for deficiency would be levied. If they had inquired of Mr. Merritt, Corporation Counsel, he would have so stated, before the Municipal Investors Association case was decided, for he so argued in his brief to the Michigan Supreme Court in the Baker case (see p. 15 of our first brief). After all, the purchase of land at 25% of assessed valuation is quite a bargain, and still leaves a considerable margin for profit even in the face of future deficiency assessments. Inquiring purchasers would know

that negotiations for the refund of these bonds were under way, that the commissioner, in anticipation of such refunding, had spread the remaining six installments of the original roll over a period of 25 years (R. 12, 41), and that by refunding, the annual installment would be greatly reduced. Certainly such purchasers would be expected to take into consideration the indebtedness of other government units which could tax the land, and contemplate the future tax burdens necessary to meet such indebtedness.

Much is made of the fact that 65% of this land went to scavenger sale, and from this it is inferred that the district had no future. The fact that owners of 11% of the lands considered the location sufficiently attractive to pay their original assessments in full (Ex. 2, R. p. 56), though not required to do so, and that the owners of 24% are paying assessments as required, are overlooked.

When we know more about the history of this district and the various factors which caused tax delinquency, it is surprising that the percentage of scavenger sale land did not exceed 65%. It is not alone the depression to which the delinquency can be attributed. There is nothing which so discourages tax collections as the prospect that they will not be enforced. The man who pays a tax only out of a sense of moral obligation is a rare exception. The certainty that it must be paid or the property lost is far more compelling.

Until 1931 there must have been a fairly good record of tax collections for this drain district, for it met all interest payments and retired $70,000.00 of the bonds. Subsequent to 1930 a condition arose which encouraged the hope on the part of many land owners in drain districts that assessments against them would be held invalid for reasons set forth in *Clinton v. Spencer*, 250

Mich. 135, *Kinner v. Spencer*, 257 Mich. 142, *Twp. of Lake v. Millar*, 257 Mich, 135, and other cases reviewed in *Royal Oak Drain District v. Keefe* (supra). In these cases a distinction was made between a drain and a sewer, and assessments set aside where the improvement was held to be of such a nature that the removal of sewage was deemed to be the primary purpose of the improvement. Even today it is impossible for anyone to state what constitutes the criteria determining that such an improvement, as this particular storm sewer drain, falls within the category of a legal drain or not. Litigation was commenced by Village of Clawson in 1931 or 1932 to cancel assessments for this improvement, and the Circuit Court of Oakland County held that the improvement was illegal and that assessments were void, restraining perpetually the levy of any assessments against the village. Naturally property owners knew of this litigation and its outcome in the Circuit Court. It was not until July, 1934, that this decision was reversed. *Village of Clawson v. Van Wagoner*, 268 Mich. 148. This litigation was the real occasion for not levying installments after 1931. Even after the decision in July, 1934, and the court had held assessments valid, the commissioner delayed until 1937 before any move was made to resume the levy of installments. During this entire period taxpayers were encouraged to believe that they were to be relieved, partially at least, from the burden of real estate taxes of every nature. Tax sales were discontinued, ten year payment plans adopted, and planning commissions were working on tax relief legislation. When the assessments were resumed in 1937, Acts 114 and 155 of that year had been passed. The owners of land on which taxes were delinquent in an amount exceeding 25% of assessed valuation, which could easily occur, because by that time assessed valua-

tions had been greatly reduced, then had a potent incentive to let their property go to the scavenger sale. They knew they could at such sale bid 25% of assessed valuation, pay cash if they so desired, or buy from the state on a land contract under which they could have ten years to pay the amount bid, in installments at 6%. There was little danger in losing the land, for they could match the bid of any outsider within thirty days after such bid had been made, and they had the advantage over the outsider in that the latter must pay cash (see Section 7, Act 155, Michigan Public Acts 1937). Under these circumstances the fact that 65% of this land went to a scavenger sale is not surprising.

Facts known about this area destroy the pessimism apparent in appellees' contention that the condition was so hopeless that all that could be expected from these scavenger sale lands was the price obtained on the sale by the state, and that destruction of the right to a deficiency assessment is a boon to bondholders in that it enabled them to get a small proportion of the proceeds of this sale.

This drain district for the most part is in the northern part of Royal Oak Township, in Oakland County; a small part lies in Troy Township. The following figures are taken from the Census Reports, Michigan Manual, and Moody's Manual of Investments, the publication constituting the standard statistical compendium for municipal investors:

> Oakland County, second in the state in regard to population and assessed valuation:
>
> Population 1930—211,251
> 1940—254,068
> Assessed valuation 1942—$252,725,909;
> 1941—$236,328,355.

The district lies partly in the City of Clawson and partly in the City of Royal Oak, which has extended its boundaries since the district was established. A small part of it lies in unincorporated areas in the two townships. It is about five or six miles from the northern boundary of the City of Detroit. Clawson is part of a contiguous group of surban cities, of which population and assessed valuation figures are as follows:

	Population		
	1930	1940	*Assessed Valuation
Clawson	3,377	4,006	$ 1,942,850.00
Berkley	5,571	6,406	3,844,675.00
Huntington Woods...	835	1,705	3,540,045.00
Royal Oak	22,904	25,087	26,282,435.00
Pleasant Ridge	2,885	3,391	3,465,695.00
Ferndale	20,855	22,523	20,302,150.00
Oak Park	1,079	1,169	1,869,940.00
	57,506	65,287	$61,247,790.00

*These figures are given in Moody's Manual for either the year 1942 or 1943. Generally it is stated that assessed valuations are on the basis of 50% of actual values.

Troy Township has a population of 8,500 and assessed valuation of $4,165,005.00.

Royal Oak Township, exclusive of the above cities, has a population of 24,958 and assessed valuation of $4,278,-935.00.

Immediately to the east of Royal Oak Township is Warren Township, of Macomb County. Population 1930, 14,269; 1940, 22,126. Assessed valuation, $15,928,755.00.

Something of the importance of this area can be gleaned from the decision in *Oakland County Drain Commissioner v. Royal Oak,* 306 Mich. 124 (1943), in

which the court considered questions raised as to the validity of the organization of the Southeastern Oakland County Sewage Disposal District. Insofar as the issues here are concerned, this case is only important for the facts there disclosed. The disposal district, which includes the township of Royal Oak and a small portion of two adjoining townships, comprises 41 square miles and has a population of approximately 100,000. Sewage from this district was carried in ten county drains (including the East Clawson Storm Sewer Drain), which ultimately discharge into Clinton River. Pollution became so serious by 1941 that the State Stream Control Commission ordered the political subdivisions involved to have the sewage treated. Legislation was passed authorizing the creation of the district and building of intercepting sewers to take the flow of these drains to the City of Detroit Sewage Disposal Plant, and the making of a contract with the city for the treatment of this sewage. The cost of the project was financed by an issue of $905,000.00 revenue bonds and a federal grant of $662,000.00. The facts so disclosed indicate the density of population in this territory, and recognition by state and federal authorities of its development. It clearly negatives the idea that any portion of the territory was in the process of reverting to wilderness because of excessive tax burdens.

Naturally a community developing as rapidly as this has serious financing problems, and must for many years bear a heavy load of debt for schools, paving, water mains, drains and sewers. Bondholders, as well as property owners, understand that liquidation of this debt must necessarily be slow, hence the willingness evidenced by refunding negotiations and the plan disclosed in the commissioner's order. However, conditions are not so serious

that bondholders must lose any part of the principal invested in order to keep the communities alive.

Statements made on page 37 of appellees' brief suggest the possibility that they are arguing that a lack of injury to bondholders must be presumed from the following consideration: Assuming appellants are correct, it was the duty of the drain commissioner to have levied a deficiency assessment in 1938, when the bonds were all due. If this levy had then been made upon the 65% of the lands which later passed through the scavenger sale, the lien incident thereto would have been extinguished and thus bondholders would have lost the benefit of the deficiency assessment so far as it related to 65% of the land. That argument would be persuasive as a defense by the commissioner were he sued for damages because of failure to make the levy, but that is not in issue here. It may be fortunate for bondholders that he did not make the levy, and that subsequent economic changes result in a condition whereby such deficiency levy would now be more productive than if it had been made when it should have been made. They are entitled to such benefit.

It also seems to be supposed that if a levy had been made in 1938, and not collected, there could have been no further deficiency levies. It is true that the law only contemplates one deficiency levy to be collected in one year unless refunding bonds are issued, in which case it may be flexible in amount and levied periodically as needed to provide a sinking fund for the retirement of the refunding securities. However, the law requiring this single deficiency levy does not limit the amount to a sum which only equals the amount of the deficiency. It must be in an amount sufficient to pay the bonds and interest. If the commissioner knows that some property has become exempt and cannot be taxed, it is his duty

to levy the deficiency for the full amount on the taxable property and municipalities, so that the loss from the exempt property will be made up. Valuable property in a taxing district may be taken over by the state and federal governments, and thus be non taxable. The law does not contemplate that the loss occasioned by the removal thereof from the assessment rolls shall be borne by bondholders. It probably would be impossible for the commissioner to know exactly what a deficiency levy would produce, and he might levy it for a sum which he was justified in believing would produce the required amount, and still be mistaken. When it becomes certain that the levy will not produce the amount necessary to discharge the debt, further additional levies can be ordered.

Hammond v. Place, 116 Mich. 628
Burnet v. City of Grand Rapids, 264 Mich. 593
State v. Common Council, 15 Wis. 30.
Norris v. Montezuma Valley Irrigation District, 248 F. 369, 374

Where a general obligation of a municipality is incurred, which can only be paid through the exercise of the taxing power, the debt is not discharged through an ineffectual exercise of that power.

State ex rel. Frazer v. Holt County Court, 135 Mo. 533
In re Dancy Drainage District, 190 Wis. 327, 332, 336

(d) Police Power Not Involved

On page 28 of appellees' brief, the argument is made that this legislation is justified by the police power. We have freely conceded that legislation reforming tax sale procedure is a legitimate exercise of the police power, and that all that is here involved is the right of a state to remove tax resources pledged to the payment of bonds. If the legislature had passed a separate law limited to the one object of freeing scavenger sale lands from future deficiency assessments to meet the bonded debts of drain districts, there would have been little doubt as to its invalidity when applied to previous debts. Confusion arises because the portion of the legislation attacked is embraced in statutes having a legitimate object. The state legislature gains no right to legislate for an object beyond its control, by incorporating provisions having that effect in statutes otherwise proper.

In reference to the police power, the provision which we attack must be considered as if embodied in a separate act of the legislature containing forthright language purporting to confer the exemption under consideration.

> "The police power is not a universal solvent by which all constitutional guaranties and limitations can be loosened and set aside, regardless of their clear and plain meaning, nor is it a substitute for those guaranties.
>
> "With regard particularly to the Federal Constitution, it is elementary that a right secured or protected by that document cannot be overthrown or impaired by any state police authority, because the police power of a state must be exercised in subordination of the Federal Constitution. • • •
>
> "Not all police regulations which have the effect of impairing a contract are obnoxious to the consti-

tutional prohibition as to impairment. It must be remembered, however, that although the obligation of contracts must yield to a proper exercise of the police power, the latter must be exercised for an end which is in fact public, and the means adopted must be reasonably adapted to the accomplishment of that end and must not be arbitrary or oppressive."

11 American Jur., pp. 993 and 1001
Treigle v. Acme Homestead Assn., 297 U. S. 189

Home Building & Loan Assn. v. Blaisdell, 290 U. S. 398, seems to be the main reliance of our adversaries and the lower court, but we think that as far as that decision goes it only sustains the police power to the extent of temporarily impairing the power to enforce contracts.

The statutory provisions, interpreted to create this exemption, do not indicate the exercise of the police power to an end which is, in fact, public. There was no public emergency requiring that a portion of drain district debts should go unpaid. The total of such debts is but a small portion of the total public debt of the state, or even the communities where this drain exists. No public disaster was threatened if some landowners were forced to lose their property because of inability to meet their portion of the debts of the districts. This statute does not provide merely for delay in enforcement,—that had already been given in good measure. It provides for absolute cancellation of a part of the obligation. In the interest of the public, if the police power argument is to be accepted, landowners are to be benefited at the expense of the district creditors. Hence the provision offends against the principle that the means for promoting public welfare must not be arbitrary and oppressive. If it becomes so essential to the welfare of the

state of Michigan that the lands of the individual owners who have acquired them at scavenger sale must be protected from further assessments for this drain debt, then the way to afford that protection is by public assumption of the obligation "so that through taxation the burden of relief afforded in the public interest may be born by the public."

Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555.

We submit that appellees' brief fails to support the decision of the lower court.

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